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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA,

Petitioner,

vs.

ANTONIO DIONISIO, Witness Before the Special February 1971 Grand Jury

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals is reported at 442 F.2d 276. The opinion of the District Court in No. 71-229 (Dionisio Pet. App. C 22-24) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1971. On June 14, 1971 the Court of Appeals denied a petition for rehearing with suggestion for rehearing en banc (Petition for Certiorari App. B, pp. 20-21). On July 8, 1971, Mr. Justice Marshall extended the time

for filing a petition for a writ of certiorari to and including August 13, 1971. The petition was filed on that date and was granted on May 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the Fourth Amendment bar the compelling of a grand jury witness to furnish a voice exemplar for comparison with exhibits consisting of recordings of intercepted wire communications where approximately twenty (20) persons have been subpoenaed to provide exemplars, absent a showing of reasonableness of the request to provide exemplars?

STATEMENT

The Special February 1971 Grand Jury in the Northern District of Illinois is allegedly investigating illegal gambling.[1] It has allegedly received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. (Supp. V) 2518, authorizing interception of wire communications.

After the return of an indictment against Charles Bishop Smith and others the United States District Court for the Northern District of Illinois granted a motion to suppress these intercepted communications. *United States* v. *Charles Bishop Smith, et al.*, No. 70 CR 852 (March 7, 1972, N.D.

[1] The term of the Grand Jury, originally due to expire in August, 1972 has been extended for an additional six (6) months and the government had indicated that appropriate requests to extend the Grand Jury to its full 36 month term will be made. 18 U.S.C. §3331.

of Ill.) (unreported).[2] The government appealed this suppression order and the matter is now pending before the Seventh Circuit. *United States* v. *Smith, et al.*, No. 72-1637.

The Grand Jury subpoenaed approximately twenty (20) persons, including respondent Dionisio, and sought to obtain from him voice exemplars for identification purposes. The witness was informed that he was a potential defendant in a matter being investigated by the Grand Jury. He was asked to examine a transcript of a recording of an intercepted communication and to go to a nearby room and read the transcript into a telephone connected to a recording device. Dionisio refused to give a voice exemplar, asserting rights under both the Fourth and Fifth Amendments. (App. p. 9).

A petition was then filed in the District Court seeking orders directing respondent to furnish a voice exemplar for comparison with the recordings. Following a hearing, the District Court ordered him to furnish the exemplars. The respondent subsequently refused to do so. (App. pp. 6-7). The District Court adjudged him guilty of civil contempt, and committed him to prison until he obeyed its order or the Grand Jury term expired (Petition for Certiorari App. D. p. 25).

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[2] Smith, as did the respondent Dionisio, refused to give voice exemplars and was a party to the opinion under review. After the return of the indictment the Solicitor sought and obtained a dismissal of the petition for certiorari as to Smith. The petitioner Dionisio therefore has an additional defense to his refusal to furnish voice exemplars. *Gelbard* v. *United States*, ... U.S. ....., 33 L.Ed. 2d 179.

The Court of Appeals reversed (442 F. 2d 276). It rejected the claim that the Grand Jury's request for the voice exemplars violated respondent's rights under the Fifth and Sixth Amendments, but concluded that to compel compliance with the request would violate his Fourth Amendment rights. In the Court's view, the Grand Jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other less unusual, method of compelling the production of the exemplars" (442 F.2d 276, 280). The Court held that the Fourth Amendment applied to Grand Jury proceedings *Hale* v. *Henkel*, 201 U.S. 43 (1906) and that this "seizure" of physical evidence contradicted the "standard of reasonableness" required by the Fourth Amendment, as recently construed in *Davis* v. *Mississippi*, 394 U.S. 721. Equating the Grand Jury's procedure to the police arrests involved in *Davis*, the Court concluded that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*". (id. at p. 281).

SUMMARY OF ARGUMENT

Although identifying characteristics such as voice, handwriting, stature, personage and facial features are not protected, in all instances, from compelled production by the Fifth Amendment, *Gilbert* v. *California*, 338 U.S. 263; *United States* v. *Wade*, 338 U.S. 218, those that are not in plain view and require some action on the part of the person compelled, such as voice, handwriting, fingerprints or blood condition are protected by the Fourth Amendment

and may not be compelled absent a showing of probable cause or reasonableness of the request. *Davis* v. *Mississippi*, 394 U.S. 721; *Schmerber* v. *California*, 384 U.S. 757.

The Fourth Amendments prohibition against unreasonable searches and seizures is not limited solely to "police" activities, but also applies to Grand Juries. *Hale* v. *Henkel*, 201 U.S. 43. A witness, summoned before the Grand Jury in response to its subpoena may refuse to give evidence which the Grand Jury seeks to compel in violation of the Fourth Amendment. The Grand Jury's right to obtain evidence from each person summoned before it is not unlimited.

ARGUMENT

I.

The Fourth Amendment Protects a Grand Jury Witness from being Compelled to Furnish Voice Exemplars Absent a Showing of Reasonableness to Compel Them.

The Fourth Amendment "protects people, not places", *Katz* v. *United States*, 389 U.S. 347, 351. As a necessary corollary to its protection of "people", the Fourth Amendment protects those personal characteristics of people which are not in "plain view" and which require some form of compulsion before production, such as blood, *Schmerber* v. *California*, 384 U.S. 757 or fingerprints, *Davis* v. *Mississippi*, 394 U.S. 721.

The Government seems to argue that since *Gilbert* v. *California*, 388 U.S. 263 and *United States* v. *Wade*, 388 U.S. 218 lay to rest any Fifth Amendment claims to resist the taking of voice exemplars it must follow that the Fourth Amendment does not similarly protect unreasonable demands to secure them.

The Government argues that voice exemplars are within the "plain view" exception to the Fourth Amendment relying principally on *Katz* v. *United States*, 389 U.S. 347. This argument misconceives what the Grand Jury sought to obtain. They argue that voice characteristics are on constant public display and therefore to compel an individual to furnish a voice exemplar is to compel him to furnish what is in plain view. This is simply not the case. A person cannot refuse to show his facial features to others unless he were to secrete himself in a locked room. But a person may, as indeed many do, mingle in society, without speaking. To speak requires a conscious act of will,

and unless that act is performed his voice is not "in plain view". Thus, since this characteristic must be created or produced with the physical and mental cooperation of the person, the Fourth Amendments protection of the "person" is applicable here. See: *United States* v. *Harris*, 453 F.2d 1317, 1320 (8th Cir., 1972).

Any doubt which may have existed concerning the relationship of compelled voice exemplars to the Fourth Amendment were resolved by this Court in *Davis* v. *Mississippi*, 394 U.S. 721, where this Court held that there was "no merit in the suggestion . . . that fingerprint evidence, because of its trustworthiness, is not subject to the prescription of the Fourth and Fourteenth Amendments." 394 U.S. 721 at 723. Although this Court did not, in *Davis*, decide whether fingerprint evidence or other physical characteristics could be compelled under judicial authority, but left that question open, implicit in the Court's opinion was the proposition that any judicial warrant or proceeding must be based upon reasonable grounds or probable cause. It is clear from *Davis* and from the Seventh Circuit opinion in *Dionisio* that the probable cause required would not necessarily be the probable cause necessary to return an indictment, but that there must be some showing of reasonableness to compel characteristics otherwise protected by the Fourth Amendment. This is not an unusual departure. Indeed this Court in *Hale* v. *Henkel*, 201 U.S. 43, in establishing the proposition that the Fourth Amendment's prohibition against unreasonable searches and seizures is not limited to "police acts" but also to Grand Jury proceedings, suggested in conclusion that with a showing of reasonableness the very documents whose production were at that stage, prohibited by the Fourth Amendment could be required to be produced the Court stated:

"Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be drawn, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." *Hale* v. *Henkel,* 201 U.S. 43, 26 S.Ct. 370, p. 380.

II.

In Order to Compel a Voice Exemplar, Otherwise Protected by the Fourth Amendment, There Must Be a Showing of the Reasonableness of the Request.

The Government also argues, that, in spite of Fourth Amendment protections, the Grand Jury may compel voice exemplars from any witness appearing before it.

The Government argues with great force, that a Grand Jury may summon any person to appear before it. The respondent generally agrees with this proposition and with this Court's observation in *Branzenburg* v. *Hayes,* 32 L.Ed. 2d 626 that "Citizens generally are not constitutionally immune from grand jury subpoenas." However, this argument begs the question. The issue in this case is not whether the respondent was properly summoned to appear, but rather whether once summoned he may be required to furnish evidence protected by the Fourth Amendment.

The Grand Jury's right to hear testimony is not an absolute. The witness, in proper circumstances, may invoke the Fifth Amendment and as in *Hale* v. *Henkel,* 201 U.S. 43, rely on the Fourth Amendment's prohibition against unreasonable searches and seizures.

The position advanced by the petitioner would limit *Hale* v. *Henkel,* 201 U.S. 43 solely to a determination of reasonableness in a subpoena requiring the production of

documentary evidence and would abrogate the effect of the Fourth Amendment to all other seizures. We respectfully submit that *Dionisio does not* establish a blanket rule that all grand jury subpoenae requiring the production of voice exemplars are subject to motions to quash based upon a lack of showing of reasonableness but limits its effect to those attempts to compel a citizen to furnish such exemplars when there has been no such showing of reasonableness.

As has been said many times, each case must rest upon its own special facts. *Sibron* v. *New York*, 392 U.S. 40. It is apparent in this case that the grand jury was engaged in a "fishing expedition" which had a "dragnet effect" since they subpoenaed twenty persons to give voice exemplars, including the respondent. There is no showing as to why the respondent was included in this large group of persons. It is clear from the record that no probable cause existed to arrest the respondent so that other attempts could be made to compel a voice exemplar rather than under the alleged aegis of a grand jury subpoena.

To suggest, as required by *Hale* v. *Henkel*, 201 U.S. 43 that the grand jury show the reasonableness of their request to obtain evidence protected by the Fourth Amendment is no less a requirement than a showing that what is sought is reasonable and relevant to the inquiry, without being oppressive. cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209.

We respectfully submit that the principles of the *Davis* v. *Mississippi*, 394 U.S. 725 apply with equal force to a subpoena, such as that presented in the instant case.

If the opinion of the Court of Appeals in this case is not valid, all that would be needed to be done to avoid the principles enunciated in *Davis* by any law enforcement

agency would be to subpoena all possible subjects before a grand jury and compel each of them to provide appropriate exemplars. The basis for the issuance of the subpoena could be as frivolous as any basis which could be imagined by a law enforcement officer and the law enforcement agencies would thereby be able to obtain indirectly what *Davis* prohibits directly. The harassment would be as oppressive and violative of personal rights as the action of police acting without grand jury authority condemned in *Davis*. The Fourth Amendment's protection against unreasonable searches and seizures may be violated by a court order to produce evidence as well as by a search conducted by police officials. *Hill* v. *Philpott*, 445 F.2d 144 (7th Cir., 1971); *United States* v. *Bailey*, 327 F.Supp. 802 (N.D. of Ill.).

Grand juries have two basic, if not contrary, functions. A prime function is to investigate possible offenses, *United States* v. *Johnson*, 319 U.S. 503, on the other hand it stands between the accuser and the accused. *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Hannah* v. *Larche*, 363 U.S. 420, 499 (Douglas, J. dissenting). If the grand jury is permitted to compel such exemplars without a showing of reasonableness it will become the oppressor and the function of the grand jury to "safeguard against hasty, malicious and oppressive action", *Ex Parte Bain*, 121 U.S. 1, 12, will have come full circle.

III.

The Showing of Reasonableness for the Obtaining of Exemplars Should Be Open and Adversary.

Petitioner urges upon this Court that if a preliminary showing of reasonableness is necessary, that showing should be an *ex parte in camera* proceeding. (P.Br. pp. 27-29) The reasoning to support this position is two-fold. First,

the secrecy of Grand Jury proceedings must be protected; and, second, an adversary proceeding would result in "inevitable lengthy delays" (P.Br. 28).

Neither of these reasons withstands scrutiny. Regarding secrecy of the Grand Jury the opinion of the Court in the companion case of the witness Mara shows how frail this argument is:

> "We have examined the affidavit and find that it does not recount proceedings before the grand jury. Rather, it states the results the Government derived from its own investigation and then presented to the grand jury. Thus disclosure here cannot be said to discourage the grand jurors from engaging in uninhibited investigation, full discussion, and conscientious voting. Since he is requesting the disclosure, certainly Mara could not be heard to object that the affidavit might reveal disparaging information about him. Moreover, he has been advised that he is a potential defendant so that the Government cannot convincingly contend that divulging the material in the affidavit would precipitate his flight from prosecution. In any case, the Government is well aware of the means at its disposal to prevent escape. Finally, the affidavit does not appear to contain information elicited from complainants and witnesses before the grand jury. Where anonymity is necessary to prevent intimidation or preserve sources of information, deletion of the witnesses' identity may be permitted under the proper standards of trustworthiness and reliability." (citing cases). *In Re September 1971 Grand Jury*, 454 F.2d 580, 583-584 (7th Cir., 1971).

It is within the Government's power to protect the privacy of Grand Jury activities by omitting such activities from mention in its showing of reasonableness. It may still rely, in the proper case, on the confidential informant as well as public information and investigative reports.

Since this Court's decision in *Dennis* v. *United States*, 384 U.S. 855 (1966) the shibboleth of "grand jury secrecy" is no longer the "magical incantation making everything connected with the grand jury's investigation somehow untouchable." *In Re September 1971 Grand Jury*, supra, at 583. Deviations from the adversary system that derogate from the constitutional rights of citizens should not be countenanced as the norm. *United States* v. *United States District Court*, 33 L.Ed.2d 752, 770 (1972); *Alderman* v. *United States*, 394 U.S. 165, 180-185 (1969). Especially is this so where the deviation does not support the goal of the effectiveness of the Grand Jury.

As for the inevitable lengthy delays, the Government takes this provision cavalierly and without citation. To the contrary, it should be noted, the witness Dionisio refused to give his voice exemplar on February 22, 1971 and the decision of the Seventh Circuit upholding his position was filed on March 25, 1971. Similarly, the witness Mara refused to give his handwriting exemplars on September 28, 1971 and the opinion upholding his position was filed on December 1, 1971.

The Government's argument that an adversary hearing would result in "inevitable lengthy delays" further completely overlooks the fact that in most instances it would be only the witness who would suffer from such a delay, if any, since he must subject himself to an order of contempt and possible imprisonment during any period of review. *Cobbledick* v. *United States*, 309 U.S. 323; *United States* v. *Ryan*, 402 U.S. 530, while the Grand Jury whose term may now be extended to three years, 18 U.S.C. §3331, suffers no real delay or hindrance to its investigation.

We therefore submit that the balancing of these factors coupled with this Court's reluctance to adopt proceedings which are antagonistic to the adversary system, *United States* v. *United States District Court*, ... U.S. ....., 33 L.Ed.2d 752; *Alderman* v. *United States*, 394 U.S. 165, require that these proceedings be, in the absence of a strong showing by the Government, adversary hearings.

CONCLUSION

Wherefore, we respectfully submit that the judgment of the court below be affirmed.

Respectfully submitted,

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